IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961.

No. 422

WILLIAM LINK,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

BRIEF FOR PETITIONER.

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner respectfully submits the following Brief supporting his prayer for this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit affirming a final judgment of the United States District Court for the Northern District of Indiana which dismissed this petitioner-plaintiff's civil action for damages for personal injuries (without trial).

Opinions Below.

The opinions of the Court of Appeals, set forth in the Transcript of Record, pp. 17-26, is reported in:

Link v. *Wabash Railroad Co.* (C.A. 7, 1961) 291 F. 2d, 542 (Judge Schnackenberg dissenting with opinion at p. 547).

No opinion was filed by the District Court.

Grounds for Invoking This Court's Jurisdiction.

This Court's general jurisdiction to review final judgments of the Courts of Appeals in civil cases is invoked.

The Court of Appeals rendered its opinion and judgment of affirmance on May 26, 1961, (R. 17), following which a timely petition for rehearing by this petitioner-plaintiff was entertained and denied on the merits on June 21, 1961. (R. 28). Petition for writ of certiorari was filed on the ninetieth day thereafter, September 19, 1961, and was granted by this Court's order of November 20, 1961. (R. 29). Counsel for Petitioner received the printed Record from the Clerk pursuant to Rule 36(5) on December 28, 1961, and this Brief is filed 30 days thereafter under Rule 41(1).

This Court's jurisdiction is based upon 28 U.S.C. 1254(1).

Constitutional Provisions, Rules, etc. Involved.

No statute, federal or state, is involved in the present Petition.

In order to show the applicability of the following *Fifth Amendment* and *Rules*, it seems proper to state very briefly here, the nature of the case and the questions involved: The Petitioner-plaintiff's action for personal injuries was

dismissed with prejudice (and thereby destroyed) by the District Court, *on its own motion*, solely for the failure of Petitioner's counsel to appear at a *pre trial hearing* (said counsel having previously informed the Court and opposing counsel of his unforeseen inability to attend at the scheduled time, but offering and requesting to appear for the conference on *the next day* or any time thereafter). This dismissal was *based* in the District Court and was *affirmed* by the Court of Appeals' majority opinion, *not by authority* of any *Rule of Civil Procedure* or any *Local Rule* authorizing such dismissal. The dismissal was based solely upon the *doctrine* that District Courts have an undefined "*inherent power*" to *dismiss* cases with prejudice as a "sanction", to be imposed upon plaintiffs in this and other undefined situations, in the District Court's "discretion", *in the absence of any Rule* authorizing the dismissal, and in the *absence of any order in the case* violated by the plaintiff or his counsel, and in the *absence of any motion by defendant* for the dismissal. (See pp. 21-23 *infra*).

The constitutional provision involved is that part of the *Fifth Amendment* to the Constitution of the United States, reading:

> "No person shall • • • be deprived of life, liberty, or *property*, without *due process* of law; • • •" (Our emphasis)

Petitioner believes that the alleged arbitrary assumption of "inherent power" by the District Court to make the dismissal in this case, approved by a 2 to 1 majority of the Court of Appeals (291 F. 2d 545-546, points 3-5; R. 21-22), is sufficiently serious from a standpoint of orderly and responsible administration of justice in the District Courts, so that it would be in the public interest for this Court to treat this review on the basis of a denial of Petitioner's

constitutional rights, rather than on a basis of mere procedural error, although we think the latter basis for review is available to this Court in this case and that reversal could properly be predicated upon either ground or on both grounds.

The only Rules *directly* involved in this review are the following **relating to pre-trial conferences**. First, is the **District Court's Local Rule 12** which, without adding anything to the Rules of Civil Procedure on that subject, provides:

> "*Pre-Trial Conferences.*
>
> "The court *may* hold pre-trial *conferences* in any civil case upon *notice* given to counsel for all parties." (Our emphasis). (Effective March 1, 1960).

The above is simply a local application of **Rule 16 of Civil Procedure**, which reads

> "*Rule 16. Pre-Trial Procedure; Formulating Issues.*
>
> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a *conference* to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the *action taken at the conference*, the amendments allowed to the pleadings, and the agreements made by the

> parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions." (Our emphasis)

The District Judge *made* the dismissal, and the majority opinion of the Court of Appeals *upheld* it, on the doctrine of the District Court's supposed "*inherent power*" to make such dismissals *outside the Rules* of Civil Procedure and outside its own Local Rule on the *subject* of dismissals. (See opinion at 291 F. 2d 542, 545-546, points 3-5; R. 21-22; and Argument hereof, at pp. 17-23 *infra*).

Nevertheless, *the Rule of Civil Procedure governing involuntary dismissals is pertinent to our Petition* because we contend that it *defined* and made *uniform* the *powers* and *procedure* of District Courts on the *subject* of dismissals,—not to be overridden by local rules, still less to be overridden by some asserted and *undefined* "*inherent power*" of a District Court to dismiss even outside of the local rule.

Rule 41(b) of Civil Procedure provides:

> "(b) Involuntary Dismissal: Effect Thereof. For *failure of the plaintiff to prosecute* or to comply with these rules or any order of court, *a defendant may move for* dismissal of an action or any claim against him • • •" (Our emphasis).

In conjunction with the language of *Rule 41 (b)*, last quoted, *requiring a motion by the defendant* as a *basis* for the Court to order a dismissal, the following **Local**

Rule 6 of this District Court will be pertinent, because it spells out strict and detailed provisions *requiring notice* and other acts by the moving party as a *prerequisite* to *motions to dismiss*:

> "(a) The time of *hearing motions* shall be *fixed* by the court. Dates of hearing shall not be specified in the notice of the motion unless prior authorization be obtained from the judge or his secretary. When time is not specified in the notice, request for hearings may be made by either counsel after the motion has been filed.
>
> (b) Motions *to dismiss*, for summary judgment, and for judgment on the pleadings *shall* be accompanied by a *brief*. An adverse party *shall have 15 days* after service of the movant's brief to *file an answer brief*. Failure to file briefs within the time prescribed shall subject such motions to summary ruling and without oral argument." (Our emphasis).
>
> District Court Rule 6 (a) (b) (Effective March 1, 1960).

Rule 83 of Civil Procedure entitled "Rules by District Courts," which is the *only* rule devoted to that *subject*, reads:

> "Each district court by action of a majority of the judges thereof may from time to time *make* and amend *rules* governing *its practice not inconsistent* with these rules. *Copies of rules* and amendments so made by any district court shall upon their promulgation be *furnished to the Supreme Court* of the United States. In all cases *not provided for by rule*, the district courts may regulate their practice in any manner *not inconsistent* with these rules." (Our emphasis).

In the Commentaries under the above Rule 83 is the following:

> "The intention of the Committee was to provide a simple, *unified* system which would be governed by a

single, brief *body* of rules. * * *. Daniel K. Hopkinson, *23 Marq. L. Rev. 159.*" (Our emphasis).

Present Local Rule 10 of this District Court, effective March 1, 1960 (formerly its **Local Rule 11** effective September 1, 1955), which is headed "Dismissal of Civil Actions Because of Lack of Prosecution" and which is the *only* Local Rule of this District Court on the *subject* of dismissal, reads, without change from the 1955 edition:

> "Civil cases in which *no action* has been taken for a period of *one year* may be dismissed *for want of prosecution* with judgment for costs *after thirty days notice* given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." (Our emphasis).

Neither the District Court nor the Court of Appeals' majority opinion sought to sustain the dismissal on the above **Local Rule 10**, nor could they, because the record shows that during the *year* preceding the dismissal of October 12, 1960, the *defendant* had filed additional interrogatories to the plaintiff on March 11, 1960 and the plaintiff filed answers thereto on April 15, 1960, *so both sides had been active within the year.* (R. 7-9).

Petitioner regards the above **Local Rule 10** as pertinent here under the doctrine that "the expression of one excludes the other".

Questions Presented for Review.

(1) The *extent* of a District Court's asserted "inherent power" in a civil case, *beyond the Rules of Civil Procedure, and beyond the District Court's local rules.*

Specifically applying the above question: When this petitioner-plaintiff's personal injury case was at issue, but *not set for trial*, and the Court had called for counsel to

come in for *a pre-trial conference*, by means of a mimeographed letter, and plaintiff's counsel failed to attend this noticed hearing,—did the District Court have the "inherent power" to enter final judgment dismissing the action with prejudice on account of this failure, *in the absence of any Rule of Civil Procedure or any local rule of the District Court authorizing such dismissal under such circumstances?*

(2) Secondary to No. 1, — if such "inherent power" did exist, did the District Court abuse the power in this case, in view of the fact that before the hour for the pre-trial hearing, plaintiff's counsel conveyed word to the Judge and to opposing counsel of his inability to attend the hearing that particular day, stating it was due to his necessary absence that day 160 miles away in Indianapolis working on an urgent case in the Supreme Court of Indiana, but that he would be ready to attend the conference the *next day* or any day thereafter?

(3) Necessarily arising out of the above questions is the question whether this majority opinion and decision requires reversal, (a) for its *confusing and destructive effect* upon the *Rules of Civil Procedure* and its distortion of the doctrine of *"inherent powers"* of the District Courts, or (b) for its violation of basic constitutional principles and violation of Petitioner's constitutional rights, or for both reasons (a) and (b).

Concise Statement of the Case.

The facts material to consideration of the questions here presented are very short and simple and are largely indicated already under the preceding headings "Questions Presented," and "Constitutional Provisions, Rules, etc. Involved".

Jurisdiction vested in the District Court under diversity of citizenship on the petitioner-plaintiff's complaint alleging severe and permanent personal injuries and praying damages exceeding the jurisdictional amount.

The printed Transcript of Record contains a complete chronological list of the docket entries in the case in the District Court from its beginning (R. 1-6) plus all orders and other papers in the case since July 2, 1959, including the transcript of the *ex parte* pre-trial hearing of October 12, 1960 at which the Court dismissed the case. (R. 11-16). It shows:

Complaint was filed August 4, 1954. Defendant filed a motion for judgment on the pleadings on April 30, 1955, which motion the Court sustained November 30, 1955. Plaintiff appealed and obtained reversal with directions to vacate the judgment and proceed with the case. *Link* v. *Wabash Railroad Co.* (7 Cir. 1956), 237 F. 2d 1, certiorari denied 352 U.S. 1003. Mandate went down to the District Court on March 13, 1957.

Without listing all the succeeding proceedings, they included an order of June 4, 1959 setting the case for trial on July 22, 1959. Then on July 2, 1959, an order was entered reciting "*At defendant's request*, to which request plaintiff agrees, trial of this case set for July 2, 1959 is *continued until further assignment* by the court. (R. 6).

There never was any trial setting made in the case *at any time thereafter* (R. 6).

The only proceedings from that indefinite trial continuance on July 2, 1959 until the pre-trial conference and dismissal of October 12, 1960, consisted of the *defendant* filing additional interrogatories for plaintiff to answer on March 11, 1960, to which, after a granted extension, the plaintiff filed answers on April 15, 1960. (R. 6, items 13-21).

The facts concerning the pre-trial conference of October 12, 1960, are recited sufficiently for present purposes in the Court of Appeals' majority opinion, 291 F. 2d at pp. 544-545. It recites that notice had been mailed to counsel on both sides on September 29, scheduling a pre-trial conference in the case for October 12, 1960 at 1 P.M., *pursuant to Local Rule 12* (above quoted at p. 4 hereof). Notice was received by counsel on both sides. On the *forenoon* of Wednesday, October 12, 1960, plaintiff's counsel called by telephone from Indianapolis (160 miles distant from the court in Hammond, Indiana) and asked the Judge's secretary for permission to talk with the Judge, but the latter was on the bench, so then plaintiff's counsel *asked her to convey to the Judge the following message* (which she did prior to the hour of hearing), namely, that he was in Indianapolis—and that he was *busy preparing papers to file with the Indiana Supreme Court*, though he was not actually engaged in argument, "that he *couldn't* be here by 1 o'clock (Wednesday, October 12), but he *would* be here either Thursday afternoon (*one day later*) or any time Friday (two days later) if it could be re-set." She told plaintiff's counsel she would convey this message to the Court and opposing counsel which she apparently promptly did to both of them before the scheduled hour of 1 P.M. Defendant's counsel told the Court at the hearing that plaintiff's counsel had called him on the preceding morning (October 11) from Indianapolis and had then stated *he expected to be in court for the pre-trial*. He said the Judge's secretary conveyed to him the above message from plaintiff's counsel on the forenoon of October 12. The opinion next goes on to say:

> "The trial judge then reviewed the history of this litigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any 'reasonable reason' for

ARGUMENT.

I.

Inherent Evils in This Distortion and Over extension of the "Inherent Powers" of District Courts.

Confronted by a simple situation where *no ground for involuntary dismissal*, was authorized in *Rule 41(b)* of Civil Procedure or in the *Local Rule 10 (former No. 11)* on dismissal (pp. 5-7 *supra*), these courts below have *created their own undefined grounds* for dismissal, *outside the letter and spirit of the Rules of Civil Procedure* established by this Court. This, they have done by putting forth a confused doctrine which:

(a) Announces the doctrine that District Courts have "*inherent power*" to dismiss cases, *without* any Rule of Civil Procedure or any Local Rule *authorizing* dismissal in the given situation. (291 F. 2d at p. 545, point 4, R. 21-22).

(b) They seem, at first, as if they are going to predicate this power upon *Rule 83* of Civil Procedure which authorizes "each district court" to make and amend *rules* governing its practice *not inconsistent* with these rules." Rule 83 requires that "*Copies of rules* and amendments so made by any district court *shall* upon their promulgation *be furnished to the Supreme Court of the United States.*" But admittedly this District Court *had no local rule* authorizing this dismissal. The Local Rule on that subject *did not* authorize such a dismissal. (p. 7 *supra*). The *majority opinion frankly admits the lack of any authorizing rule* and states that the District Court *did not base this dismissal* on either the *Local Rule* or *Rule 41(b)* of Civil Procedure. (291 F. 2d at p. 545, point 3, R. 21).

(c) Then they proceed to *distort and enlarge* the next and final sentence of *Rule 83*, which reads:

> "In all cases not provided for by rule, the district courts may *regulate* their practice in any manner *not inconsistent* with these rules." (291 F. 2d at p. 545, point 3, R. 21).

The "inconsistency" and havoc which would be created in the Rules of Civil Procedure across the *nation by this distortion* permitting each district court to render final judgments of dismissal (or other equally important matters) under the guise of "regulating their local practice", *outside the Rules of Civil Procedure*, and *without* even a promulgated *local rule* to authorize it or to guide attorneys or safeguard litigants, *all unknown to the Supreme Court* until some victim of the unpublished "practice" comes up on certiorari,—is obvious.

(d) Next, the majority opinion reverts to the "inherent power" doctrine,—but this time it is enlarged to justify dismissals as "sanctions," imposed under no defined standards to enforce vague compliances (including necessarily an attorney's inability to get to a pre-trial conference on schedule as in this case. (291 F. 2d 545, point 4, R. 21-22).

If this Court permits that majority opinion to stand, then the Rules of Civil Procedure, which represent great labor not only by this Court but by able and dedicated committees, will become a mockery, relied upon by lawyers and litigants, but actually subject to be nullified by any District Court at any time in any case, under this newly announced "inherent power" of each District Court to "regulate its practice" (they ignore the plain and *necessary* purpose and intent of the words "not inconsistent with", though they do lip service to them by quoting them.)

"Regulate *what practice?*" The plain purpose of this language was to give the District Courts enough authority to handle minor local practice problems, which necessarily differ in different courts and parts of the country.

But not to cast aside the nationwide *Rule 41(b)* on the *major* subject of "Involuntary Dismissals" and the final judgments resulting therefrom,—often cases of large amounts and national importance.

If *this* Rule of Civil Procedure is subject to be nullified or evaded or modified at the will or whim of any District Court under the guise of "regulating its procedure", *which* of the Rules of Civil Procedure are *not* subject to be by-passed?

And if a District Court has a Local Rule covering the subject of *dismissal*, as this one had, what good is it if the Court can by-pass it and make up a different rule or "practice" on the spur of the moment?

This majority opinion in effect makes every District Court a self-governed barony, so far as procedure is concerned, *only nominally under* the Supreme Court's Rules of Civil Procedure.

Under the old Conformity Act, we at least had the protection of the settled state practice in the federal courts.

The resulting injustice, evils, confusion and depreciation of the Supreme Court's function, at least in procedural matters, are apparent without further elaboration.

Petitioner does not argue—nobody argues—against giving District Courts and all courts the "sanctions" necessary to maintain respect and orderly procedure, *within the framework* of the *Rules of Civil Procedure* and the *Constitution*. The Rules of Civil Procedure *spell out many*

sanctions appropriate to various situations. (For instance, the *discovery Rules 30(g)* and *Rule 37(b) and (d)*). But *nowhere in those Rules is there authorized or indicated such an abortive and arbitrary dismissal as this one,* under the guise of a "sanction" for no reason except that plaintiff's counsel "had failed to indicate any reasonable reason" for not arriving. How could he speak for himself and give "reasonable reasons" in his absence?

There is no showing in the Record of proceedings in the District Court or in the majority opinion that the case was in any way delayed by counsel's *one day* delay in arrival. *The opinion admits that the case had previously been delayed during a two year period 1955-1957 by the District Court's error in granting judgment on the pleadings upon defendant's erroneous motion therefor* (291 F. 2d at p. 543, second column, R. 18). The defendant fought the plaintiff to the Supreme Court on that issue on its unsuccessful petition for certiorari. *That error of the District Court cost the plaintiff much money and his counsel much labor.* Yet the District Court, at the abortive, *ex parte* pre-trial hearing expressed some indignation and concern over the alleged inconvenience to the Court and defense counsel on account of plaintiff's counsel's delaying *one day.* (R. 13, 15-16). And both the Court and defense counsel joined in complaining about the *age* of the case, though their own errors had put much of the age on it. (R. 13-16).

While we do not think that alleged *fault* of plaintiff's counsel for being absent, is material to the main issue above discussed, *the admitted facts stated in the majority opinion show that no reasonable fault existed* (291 F. 2d at pp. 544-545, R. 20).

The latter part of the majority opinion erroneously implies that at oral argument plaintiff's counsel "conceded" fault in not getting to the conference. (291 F. 2d at p. 546, second column, R. 23, bottom). The Appellant's Brief in the Court of Appeals, which has come up here bound with the Record Appendix under that Court's practice (its *Rule 16a*) shows that it contained a vigorous defense of counsel's *lack* of fault under a section headed "Adequate Showing of Inability of Plaintiff's Counsel to be Present" (p. 11 of brief). In oral argument we adhered to the same position. Why should the victim apologize? What the opinion apparently refers to is our answer to a *hypothetical* question from the bench,—*if* a plaintiff's attorney were at fault in not attending a hearing, what sanction should be imposed? Our answer was that *if* such a thing occurred, the court would have ample power to discipline the attorney as an *officer* of the court, but not to *dismiss* his client's case. Our position is the same now.

Dismissal on Court's Own Motion, When the Defendant Could Not Have Thus Obtained This Dismissal at That Time and Manner.

This "inherent power" doctrine, wherein the District Court took the initiative and in effect dismissed the case *on its own motion*, as a supposed "sanction" imposed for the absence of plaintiff's counsel, had an unusual and probably unprecedented result:

Under all the existing dismissal rules, *the defendant's counsel could not have obtained this dismissal judgment*, at this pre-trial hearing, *without motion* or notice of motion for such dismissal.

Rule 41(b) of Civil procedure requires that for any failure of the plaintiff to prosecute or to comply with the

Rules of Civil Procedure or any order, "*a defendant may move* for dismissal".

Local Rule 6(b) required generally and *without qualification that Motions to dismiss* must be accompanied by a supporting brief, with 15 days for an answer brief. (See quotation, p. 6 *supra*.)

The record shows that at no time, during or after the pre-trial hearing, did defense counsel file or serve a written motion to dismiss, *or even go so far as to make an actual oral motion to dismiss during the hearing*. The transcript of the hearing shows that the Judge took the initiative throughout the hearing. He merely asked defense counsel for his "thinking", and counsel (Mr. Bodle) "suggested" to the Judge that the latter had this "inherent power" to dismiss, but *refrained* from making any actual motion:

The Judge had called in his secretary to relate on the record her telephone call from plaintiff's counsel that forenoon, which she obviously had already reported to the Judge before the hearing (see p. 10 above, also R. 13). The following then took place:

> "The Court: That is all, as you recall it, that was said?
>
> Miss Griffith: Yes sir.
>
> The Court: Thank you. Under the circumstances, what is *your thinking*, Mr. Bodle?
>
> Mr. Bodle: I would certainly *suggest* to the Court that *it has inherent authority to dismiss cases*, not only under its own local rule concerning prosecution, but it has *inherent power, without any specific rule*, by virtue of Federal Rule 83, and *the inherent power of the Court to dismiss* where the Court *thinks* it necessary under the particular *situations not provided for by any specific rule*. (Our emphasis). (R. 13-14).

Then, after some further discussion, mainly consisting of the Judge and defense counsel joining in criticizing plaintiff's counsel for not getting there and blaming him of the "age" of the case, the Judge *on his own motion*, dismissed the case and directed the Clerk to enter the dismissal judgment. (R. 16).

Thus it is clear as a matter of law that under all available dismissal rules (pp. 5-7 *supra*), *the defendant could not have moved for, and in fact did not move for a dismissal*, but *the Judge, taking the initiative throughout the hearing, ordered a dismissal in the absence of plaintiff's counsel*, without the latter *knowing* that any dismissal was impending or contemplated, and without so much as giving him an *opportunity to get back the next day and be heard* in opposition.

This is one illustration of the evils, injustices and abortive procedure which flow from this "inherent power" doctrine, *derived from distorting the scope and purpose of Rule 83 of Civil Procedure*.

Uniformity of the Federal Rules of Civil Procedure.

Except the Supreme Court, the Constitution placed the *creation* and *procedure* of all federal courts in the hands of Congress:

> "The *judicial power* of the United States shall be vested in one Supreme Court, and in *such inferior courts* as the congress *may* from time to time *ordain and establish*. * * *" (Our emphasis).
>
> Constitution, Article 3, Sec. 1.

In 1934 Congress delegated to the Supreme Court this function of regulating practice in the District Courts in civil law actions (the equity practice having been previously placed under Supreme Court control):

ACT EMPOWERING THE SUPREME COURT OF THE UNITED STATES TO PRESCRIBE RULES

THE ACT OF JUNE 19, 1934, CH. 651

"Be it enacted * * * That the Supreme Court of the United States shall have the power to *prescribe*, by *general rules*, for the *district courts* of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the *practice* and *procedure in civil actions* at law. Said rules shall neither abridge, enlarge, nor modify the *substantive* rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time *unite* the *general rules* prescribed by it for cases *in equity* with those in actions *at law* so as to *secure one form of civil action and procedure* for both: * * *" Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U.S.C., Title 28, §§ 723b, 723c, now §2072). (Our emphasis).

28 U.S.C.A., front page XI, preceding Rule 1.

The Supreme Court by its original Order of January 3, 1935 (followed by subsequent amending Orders) undertook this function:

ORDERS OF THE SUPREME COURT OF UNITED STATES REGARDING CIVIL RULES

"Order of January 3, 1935, Appointing Advisory Committee

1. *Pursuant to Section 2* of the Act of June 19, 1934, c. 651, 48 Stat. 1064 the Court will undertake the preparation of *a unified system of general rules* for cases in equity and actions at law in *the District Courts* of the United States and in the Supreme Court of the District of Columbia, *so as to secure one form of civil action and procedure for both classes of cases*, while maintaining inviolate the

right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.

2. To assist the Court in this undertaking, the Court appoints the following Advisory Committee to serve without compensation:

* * * * *

3. It shall be the *duty of the Advisory Committee*, subject to the instructions of the Court, to prepare and submit to the Court a draft of *a unified system of rules* as above described." (Our emphasis).

* * * * *

28 U.S.C.A., front pages XIII and XIV preceding Rule 1.

The Rules of Civil Procedure thus created start out with the following guidepost:

"Scope of Rules.

These rules *govern* the procedure in the United States *district courts* in *all* suits of civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They *shall* be construed to secure the *just*, speedy, and inexpensive determination of every action. As amended Dec. 29, 1948, effective Oct. 20, 1949." (Our emphasis).

Rule 1 of Rules of Civil Procedure.

Uniformity of procedure in all the District Courts is the purpose spelled out in the above Act of 1934, this Court's *Order of January 3, 1935*, and also spelled out in the opening *Rule 1* (supra) and the entire body of the Rules of Civil Procedure as an entity,—whose original creation and subsequent improvement have involved enormous labor by the Supreme Court and its successive Advisory Committees. One indication of the merit of their work, is the fact that many States have copied or adopted these Rules

in whole or in part. (See for instance the Florida and Ohio cases on this present Pre-Trial problem under their similar Rules, pp. 37-40 *infra*).

The Act of 1934 delegates to this Court the "*power* to *prescribe*, by *general* rules, *for the District Courts* • • • *the practice and procedure in civil actions at law.*" This is followed in Sec. 2 by power for this Court "at any time" to "unite" its existing Equity Rules with those in actions at law, "*so as to secure one form* of civil action and *procedure* for both".

This Court's order of January 3, 1935 appoints a distinguished advisory committee "*to assist this Court in this undertaking*" (par. 2) and directs them "to prepare and submit to the Court a draft of a *unified system* of rules as above described." (par. 3).

When this majority opinion below distorts and enlarges *Rule 83 of Civil Procedure* on the subject of Local Rules, and then takes off from there into the alleged undefined and unlimited "inherent power" of District Courts to *dismiss* cases with prejudice (and thereby destroy property rights) as a supposed "sanction" to enforce this "inherent power" at the District Court's "discretion", it violates: (1) the basic purpose of Congress and the Supreme Court by *destroying the uniformity* of practice spelled out in the Rules of Civil Procedure, and (2) it allows each District Court to not only make Local Rules but to use its "inherent power" *on the spur of the moment* to destroy these cases at its own whim ("discretion") *in the absence* of *Rule of Civil Procedure* or any *Local Rule* in the absence of any *order* made or violated in this particular case, thereby not only making a mockery of the "uniformity" of the *Rules of Civil Procedure*, but also (3) violating basic con-

stitutional principles relating to the judiciary and violating this Petitioner's rights to *due process*.

The confused reasoning in the majority opinion to sustain this dismissal touches, confuses and violates several important fields in the law, namely:

Basic Nature of "Inherent Power" of Courts and Other Governmental Agencies.

This power *arises out of*, and is *limited to*, what is "reasonably proper and *necessary*" for the Court or other agency to perform its expressed functions:

> "Under our judicial system our courts have such powers and jurisdiction as are defined by our laws constitutional and statutory. Under our system there is no such thing as the *inherent power* of a court, 'if, by that, he meant a power which a court may exercise without a law authorizing it.' *Messner* v. *Giddings*, 65 Tex. 301. Of course, jurisdiction is granted by law when it is either directly conferred or ought to be implied from the jurisdiction directly granted. In other words, our courts have such powers and jurisdiction as are directly provided by law, and, in addition thereto, they have such further powers and jurisdiction as are ***reasonably proper*** and ***necessary***, —that is, *as ought to be inferred*, from the powers and jurisdiction directly granted. Generally speaking, we think the above rule applies *to every other department* of the State government. They have such powers, and *such powers only*, as are expressly conferred on them by law, constitutional and statutory, and *as ought* to be inferred, or implied from the powers directly conferred." (Our emphasis).
>
> Ex parte Hughes (S. Ct. Tex. 1939) 133 Texas 505, 129 S.W. 270, 273-274

"The *inherent powers* of courts are derived *from the laws* to which the courts owe their existence and

do not exist without express or implied grant". (Our emphasis)

21 C.J.S., Courts, Sec. 31, p. 41, note 79

"The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have *inherent power* to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

In *McVeigh* v. *United States*, 78 U.S. 11 Wall. 259 (20:80), the court, through Mr. Justice Swayne, said (p. 267 (81)):

'In our judgment, *the district court committed a serious error* in ordering the claim and answer of the respondent to be *stricken* from the files. * * *'" (Our emphasis).

Hoven v. *Elliott* (1897), 167 U.S. 409, 414, 417-418, 17 S. Ct. 841, 42 L. Ed. 215, 220, 221

There is now even less reason or authority for the District Courts to seek to enlarge their "inherent power" either by virtue of *Rule 83 of Court Procedure* or on asserted general principles, because the "uniform" Rules of Civil Procedure carefully *cover* the subject of *involuntary dismissals* (*Rule 41b*) and every other procedural matter normally arising in civil cases.

This brings into operation another widely operating principle, namely:

The Expression of One Excludes the Other.

Rule 41(b) of Civil Procedure, specifies the *grounds* and the *procedure* by which a defendant can obtain this im-

portant and dangerous destruction of a plaintiff's case (property right). The only grounds are:

> "For failure of the plaintiff to prosecute or to comply with *these* rules (of Civil Procedure) or any order of court."

But even if the grounds allegedly exist, the Rule is not and could not be self-executing or be executed by the District Court *on its own motion* as was done here (pages 10-12, 21-23, *supra*). This Rule provides that if the grounds allegedly exist, "a *defendant* may *move* for dismissal".

> "Under the general rule of *express mention* and *implied exclusion*, the express mention of one matter *excludes all other similar matters* not mentioned; • • • and an affirmative description of powers granted *implies a denial of non-described powers.* • • •" (Our emphasis). (Citing *Continental Casualty Co.* v. *U. S.*, quoted *infra*).
>
> 82 C.J.S., Statutes, Sec. 333, p. 668, notes 74-75.

> "The statement of conditions *negatives action* without the satisfaction of these requirements. Generally speaking 'a legislative affirmative description *implies denial of the non-described powers' Durousseau* v. *United States*, 6 Cranch (U.S.) 307, 314, 3 L. Ed. 232, 234."
>
> *Continental Casualty Co.* v. *United States* (1942) 314 U.S. 527, 533, 86 L. Ed. 426, 431, 62 S. Ct. 393.

> "The *judgment* of a court must be *exercised in the mode prescribed by the law of the land.* The *legislature* has the power to regulate the manner or to fix conditions under which the jurisdiction may be exercised.
>
> The *protective features* of statutes prescribing the *mode* in which jurisdiction may be exercised *must be substantially complied with*; • • •"
>
> 21 C.J.S., Courts, Sec. 89, p. 139, notes 36, 39.

Under the above Act of 1934, this Court's Order of January 3, 1935, its subsequent orders, and its decisions long before and after 1935, *every litigant and lawyer was entitled to assume* that the *Rules of Civil Procedure* were the "laws of the land", as much as if these Rules had been enacted by Congress. They were also entitled to assume that these "uniform" Rules could be relied upon as defining their procedural rights in what they did *not* say as much as in what they *did* say, upon the basic principles in the text and case last quoted.

There was no "vacuum" left for the District Court to fill in this situation by Local Rule or order. At least the Court could not fill it under its asserted "inherent power" to apply its "sanctions".

The opinion, while confusedly speaking of *Rule 83 of Civil Procedure* on dismissal and this District Court's former *Local Rule 11* (now renumbered as Local Rule 10) which permits dismissal of cases entirely *inactive* for one year *after 30 days notice,—frankly admits that this dismissal was not and could not be based* upon *Rule 41b* of Civil Procedure for *lack of any motion by the defendant*, nor upon *Local Rule 11* (now 10) because the case had been active on *both* sides within the year preceding dismissal and no notice was given. (See pages 7, 9-10 *supra;* also 291 F. 2d at page 545, point 3, R. 21).

Hence, it is not presently necessary for this Court to pass upon the validity of such local rules for dismissal of inactive cases. The majority opinion below points out the immaterial fact that in an earlier case having no connection with this one, it upheld this *Local Rule 11* (*now 10*) and in that case it injected a *dictum* about "inherent power", after which certiorari was denied (*Darlington* v. *Studebaker-Packard Corp.*, 7 Cir. 1959, 261 F. 2d 903, 905, cert. den. 359 U.S. 992). But this Court has repeatedly pointed out

that *denial of certiorari does not in any way imply approval of the result or the language of the lower court's opinion, nor bind this Court in any way in future cases which it accepts.*

Involuntary Dismissals Are Governed by the Applicable Rules of Civil Procedure,—Not by "Inherent Power" of the District Court.

In the following case involving alleged *failure to comply* with a District Court's *order* made under Rule 34 for production of documents, the District Court based its *dismissal* both upon *Rule 37(b)(2)* of Civil Procedure which expressly *authorizes* the sanction of dismissal for violation of such discovery orders, and also "*under its own inherent power.*" The Court of Appeals upheld the dismissal, not upon *Rule 37* but upon *Rule 41(b)* "*and on the District Court's inherent power.*" **The Supreme Court, refusing to approve this "inherent power" doctrine,** which, as here, had been relied upon by the District Court and the Court of Appeals, held that: "In our opinion, **whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively under Rule 37.**" The Court said on that subject and also on the "*due process*" aspect of the case:

> "• • • Nevertheless the (district) court, in February 1953, *granted the Government's motion to dismiss the complaint* and filed an opinion wherein it concluded that: • • • and (4) that the court in these circumstances had power *under Rule 37(b)(2)*, as well as *inherent power*, to dismiss the complaint. 111 F. Supp. 435. • • •
>
> • • • • •
>
> "• • • This order was *affirmed* by the *Court of Appeals*, • • •. The court found it *unnecessary* to decide whether *Rule 37 authorized dismissal* under these circumstances since it ruled that the District Court was

empowered to dismiss **both** by **Rule 41(b)** of the Federal Rules of Civil Procedure, **and under its own 'inherent power.'** It did, however, modify the dismissal order to allow petitioner an additional six months in which to continue its efforts. 96 U.S. App. D.C. 232, 225 F. 2d 532. We denied certiorari. 350 U.S. 937, 76 S. Ct. 302, 100 L. Ed. 818.

* * * * *

"* * * Finally, petitioner presented the District Court with a plan, already approved by the Swiss Government, which was designed to achieve maximum compliance with the production order: A 'neutral' expert, who might be an American, would be appointed as investigator with the consent of the parties, District Court and Swiss authorities. * * *

* * * * *

"The District Court, however, refused to entertain this plan or to inspect the documents tendered in order to determine whether there had been substantial compliance with the production order. *It directed final dismissal of the action.* The Court of Appeals *affirmed*, but at the same time observed: 'That (petitioner) and its counsel patiently and diligently sought to achieve compliance * * * is not to be doubted.' 100 U.S. App. D.C. 148, 149, 243 F. 2d 254, 255. Because this decision raised important questions *as to the proper application of the Federal Rules of Civil Procedure*, we granted certiorari. 355 U.S. 812, 78 S. Ct. 61, 2 L. Ed. 2d 30.

* * * * *

"We consider next *the source of the authority* of a District Court *to dismiss a complaint for failure* of a plaintiff *to comply* with a *production order*. The District Court found power to dismiss under *Rule 37(b)(2)(iii)* of the Federal Rules of Civil Procedure as well as in the *general equity powers* of a federal court. *The Court of Appeals chose not* to rely upon *Rule 37*, but rested such power on *Rule 41(b)* **and on the District Court's inherent power**.

"*Rule 37 describes the consequences* of a refusal to make discovery. Subsection (b), which is entitled 'Failure to Comply With Order,' provides in pertinent part:

> "(2) • • • If any party • • • refuses to obey • • • an order made under Rule 34 to produce any document or other thing for inspection • • •, *the court may make* such orders in regard to the refusal as are just, and among others the following: •
>
> • • • • •
>
> "(iii) An order striking out pleadings or parts thereof • • •, *or dismissing the action* or proceeding or any part thereof • • •."

"*Rule 41(b)* is concerned with involuntary dismissals and reads in part: 'For failure of the plaintiff to prosecute or to comply with *these rules* or *any order of court*, a defendant *may move* for dismissal of an action or of any claim against him.'

"In our opinion, **whether a court has power to dismiss a complaint** because of noncompliance with a production order **depends exclusively upon Rule 37**, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.' • • • **Reliance** upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, **or upon 'inherent power,' can only obscure analysis of the problem before us**. See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col. L. Rev. 480.

• • • • •

"We turn to the remaining question, whether the District Court *properly exercised* its powers under *Rule 37(b)* by *dismissing this complaint* despite the findings that petitioner had not been in collusion with the Swiss authorities to block inspection of the Sturzenegger records, and had in good faith made diligent efforts to execute the production order.

• • • • •

"The provisions of *Rule 37* which are here involved *must* be read in light of the provisions of the *Fifth Amendment* that no person shall be deprived of property *without due process* of law, and more particularly against the opinions of this Court in *Hovey* v. *Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, and *Hammond Packing Co.* v. *State of Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530. These decisions establish that there are *constitutional limitations upon the power of courts*, even in aid of their own valid processes, *to dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed) p. 4325, 28 U.S.C.A.

• • • • •

"These *two decisions* leave open the question whether *Fifth Amendment* due process is violated by the *striking of a complaint* because of a plaintiff's liability, despite good-faith efforts, to comply with a pre-trial production *order*. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. *Tot* v. *United States*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519. Certainly *substantial constitutional questions* are provoked *by such action*. • • •

• • • • •

"In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that *Rule 37 should not be construed to authorize dismissal* of this complaint because of petitioner's noncompliance with a *pre-trial* production *order* when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." (Our emphasis).

Societe Internationale, etc. v. *Rogers* (1958) 357 U.S. 197, 201, 203, 206-210, 212, 78 S. Ct. 1087, 1090-1096, 2 L. Ed. 1255.

• • • • •

Fallacy that Failure to Comply with a "Local Rule" Is Equivalent to a Violation of an "Order" in the Case, as Ground for the Court to Apply the "Sanction" of Dismissal.

Another facet of the confused complex of reasons given in the majority opinion to support this dismissal is this: It starts with the dubious statement that:

> "*Local Rule 12* had been *promulgated* by an order of the court. Certainly a *notice* sent pursuant to an order of the court *embodied* in a court *rule*, does and should have *all the force and effect of an order of the court.*" (291 F. 2d at p. 545, point 2, R. 21).

This *Local Rule 12* (carrying no sanction in itself as do *Rules 37(b) and (d)* and *Rule 41(b)* of Civil Procedure) reads in its entirety:

> "The court *may* hold pre-trial *conferences* in any civil case upon *notice* given to counsel for all parties." (Our emphasis).

The majority opinion admits that there was no *order* in the case directing anybody to appear at this pre-trial conference but that it was scheduled by "notice mailed to counsel for both parties" on September 29, 1960, which was duly received. (291 F. 2d at p. 544, first column, R. 19).

The majority opinion (p. 545, point 4, R. 21-22) brands as "sheer sophistry" our contention to the Court of Appeals that we had not failed to comply with an "order" in the case under *Rule 41(b)*, because this Local Rule and notice did not purport to be an "order" in the case and was never filed with the District Court's clerk or made a part of the record. (R. 4, bottom, showing no order or

proceeding from April 15, 1960 when plaintiff filed answers to interrogatories and October 12, 1960 when the pre-trial conference came on and the Judge dismissed the case on his own motion).

The majority opinion admits that this dismissal was *not based* on a violation of *Rule 41(b)* or on any rule relating to dismissal. Then it *lumps together* "*rules, orders* and *proceedings*" (the last term undefined) and holds that the District Court had "inherent power" to "impose appropriate sanctions for failure to comply" with *any* of these things. (291 F. 2d at p. 545, point 4, R. 21-22).

The inference, not clearly stated, is that failure to attend this "conference" pursuant to *Local Rule 12* and the notice, *was as potent* to invoke this "inherent power" and "sanction" of dismissal as a failure to comply with an "*order*" in the case *would* have been if there had been an order. This argument defeats itself, because if *Local Rule 12* and the notice constituted an "order", the dismissal should have been sought and made (if justified) on *motion by the defendant*, which was *not* done.

But the main damage which this part of the majority opinion's argument does to the *Rules of Civil Procedure* and to the law generally is that it obscures or wipes out the important distinction between an "order" and a "Local Rule" of the particular court.

> "• • • These words 'rule' and 'order', when used in a statute, have a definite signification. They are *different* in their *nature* and *extent*. A *rule*, to be valid, must be *general* in its scope, and undiscriminating in its application; an *order* is *specific* and *limited* in its application. • • •" (Our emphasis).
>
> *Morris* v. *Board of Pilot Com'rs.* (1894) 7 Del. Ch. 146, 30 Atl. 667, 669

There are many kinds of "Local Rules", usually on minor procedural or administrative matters affecting litigants and attorneys generally. "Orders" are of many kinds, but they affect only specific rights and duties of litigants in a specific case. "Orders" are appealable, either when entered or upon final adjudication of the case. "Local Rules" are not applicable. They, unlike "orders" are filed with the Clerk of the Supreme Court, under *Rule 83 of Civil Proc dure*.

It must be assumed that the Supreme Court and its Advisory Committee knew and intended the distinction between a "Local Rule" (which is only mentioned in one Rule (83), and "orders" in a case which are provided for in many of the Rules, with specified "sanctions" for their enforcement in many of them such as *Rules 37(b)(d)* and *41(b)*.

Recent Cases Holding That Failure of an Attorney for Plaintiff or Defendant to Attend a Pre-Trial Conference Does Not Subject the Plaintiff to Dismissal or the Defendant to a Default.

"* * * Counsel were *notified* of the date and place for pre-trial conference but neither the plaintiff nor his *counsel* appeared *nor gave any reason* for their absence. Failing in this, the court entered an order dismissing the case 'with prejudice' at the cost of the plaintiff. This appeal is from that order.

The point for determination is whether or not the trial court committed error in dismissing the cause for failure of plaintiff or his counsel to attend the pre-trial conference.

Common Law Rule 16, 30 F.S.A., and Equity Rule 77, 31 F.S.A. provide that the 'court may of its own motion or shall on motion of either party to the cause direct and require the attorneys for the parties to appear before it for conference * * *

* * * * *

The pre-trial conference rule was *extracted from the Federal Rules of Civil Procedure*, 28 U.S.C.A. * * * it is the duty of counsel to attend or seek a continuance for cause. He should not treat the call with *indifference* or *ignore* it *as he did in this case*. * * * Counsel are expected to conform with this *rule* as they would any other *rule*, or be called to account for failure to do so.

The court unquestionably has power to *discipline counsel* for *refusal* or failure to meet the requirements of the rule. Such refusal may warrant a citation for contempt or a lesser degree of punishment, but it is our view that the major punishment for such delicts should ordinarily be imposed on counsel rather than on the litigant. Dismissal 'with prejudice' in effect *disposes of the case*, not for any dereliction on the part of the litigant, but on the part of his counsel. We are not unmindful of the rule that counsel is the litigant's *agent* and that his acts are the acts of the principal, but *since the rule is primarily for the governance of counsel, dismissal 'with prejudice' would in effect punish the litigant* instead of his counsel. Although *persistent* refusal to attend might, in the interest of justice, require a dismissal *without* prejudice, we think for the reasons given that such dismissal upon the *first infraction* is *too severe*." (Our emphasis).

Beasley v. *Girten* (Supreme Ct., Fla., Division A, 1952), 61 So. Rep. 2d, 179, 180-181.

"The record discloses further that in accordance with the rules of court the case was *assigned for pre-trial* on February 7, 1956; that *neither defendant nor counsel appeared* in obedience to the command of the court that they do so; and that plaintiff and its counsel did so appear. Thereupon, the court approved the following judgment entry, to-wit:

'This day this cause came on to be heard on the petition of the plaintiff, the answer of the defendant, the reply of the plaintiff, and the *order* of this court

dated December 16, 1955, *setting* for *pre-trial hearing* Tuesday, February 7, 1956, and specifically requiring both parties to be present in court.

'Upon hearing, the defendant and/or defendant's counsel having failed to appear, as required by this court's previous *order* hereinbefore set out, the court having examined the written evidence offered by the plaintiff, * * *

'The court further finds that the *defendant is in default for failure to appear* in court in compliance with the court's previous *order* hereinbefore set forth, and that the defendant is indebted to the plaintiff in the sum of $509.60 plus interest at 6% per annum from September 16, 1954, in the amount of $45.87 making a total of $555.47.

* * * * *

* * * Authority for pre-trial proceedings in this state is of comparatively recent origin; hence, we have been able to find only one reported Ohio case on the question presented. The case referred to is *Szabo* v. *Waradi*, Ohio App. 44 N.E. 2d 270, 36 Ohio Law Abst. 407, the first paragraph of the headnotes of which is:

> 'A pre-trial *rule authorizing* the judge, *upon failure of counsel for defendant to appear*, to proceed with the case, allow amendments, fix the number of witnesses, decide all preliminary matters and make proper findings, *does not intend that upon failure of counsel for defendant to appear, the court should finally dispose of any case where issues of fact are disclosed by the pleadings*, and does not deprive defendant of the *right to a jury trial* after having a default judgment entered against him; consequently, the refusal of the court to grant defendant a jury trial is prejudicial error.'

The opinion in that case was written by Judge Skeel of the Eighth Appellate District and is in accordance with our views on the question we have here. See, also, textbook entitled 'Pre-Trial' by Harry D. Nims, page 153.

The judgment is reversed, and the cause is remanded for further proceedings according to law." (Our emphasis).

Universal C. I. T. Credit Corp. v. *Stires*, 103 Ohio App. 405, 145 N.E. 2d 541, 543.

The very name pre-trial "conference", used in both *Rule 16 of Civil Procedure* and *Local Rule 12*, as well as the stated procedure and *objectives* in *Rule 16*, rebut the idea that upon mere notice and failure to attend, either party should summarily lose his case:

"The procedure at pretrial conferences *depends* on the terms of the governing *statutes* and *rules*. The participants in a pretrial conference should adhere to the *spirit* of that procedure, and have been held to waive questions not there presented. In order to accomplish the *purpose* of pretrial procedure and make it serve a useful purpose in the process of adjudication, there must be a *spirit of co-operation between the court and the counsel* representing litigants; there must be a mutual understanding of what may properly be accomplished by a pretrial conference. The court and attorneys should approach the pretrial procedure with a *cordial and co-operative attitude; the court should not lose patience* or permit the attorneys to engage in heated arguments. It is the duty of counsel to attend *or to seek a continuance* for cause; the court has *power* to *discipline counsel* for a *refusal* or failure to attend a pretrial conference, and such *refusal* may warrant a citation for *contempt* or a lesser degree of punishment. *On the failure of counsel* for a party to appear, the pretrial judge *may* have authority to *proceed with the case*, allow amendments, fix the number of witnesses, *decide all other preliminary matters*, and make such findings as are proper. • • •" (Our emphasis).

88 C.J.S., Trial, Sec. 17(2), p. 46.

A very old Supreme Court decision involved a problem such as might now arise under *Rule 41(b)*, and though not

exactly in point, the decision and reasoning support our position:

> "The 15th section of the Judiciary Act of 1789, under which these proceedings were had, *authorizes the court*, upon motion and due notice thereof, *to require a party to produce books* or writings in his possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and *if a plaintiff shall fail* to comply with such *order*, it shall be lawful for the court, *on motion, to give the like judgment* for the defendant as in cases of *nonsuit*.
>
> The transcript does *not* show that any *motion* was made for an *order* upon the plaintiff to produce the books and papers mentioned in the notice. It shows that a motion was made to render a judgment of nonsuit for not complying with the notice, and also a motion for a continuance of the case. *But the court is not authorized* by the Act of Congress to enter a judgment of nonsuit upon the *failure* of the party to comply with the *notice*. The notice is merely a preliminary proceeding, to enable the party to bring before the court the motion for the order to produce; and when that motion is made, the party called on has a right to be heard, and he is not bound to produce the books and papers called for, until the court shall *order* him to produce them, and is in no default *unless* he refuses or neglects to obey the *order*. The court was, therefore, right in refusing to enter the judgment, *when no order* had been moved for or granted." (Our emphasis).
>
> *Thompson* v. *Selden* (1858) 61 U.S. 195 (20 How. 195) 15 L. Ed. 1001, 1002

And the following recent case, though not on the point of pre-trial, seems quite applicable to rebut the majority opinion in this case holding in effect that for the great offense of being *one day* late in attending this pre-trial

"conference", the plaintiff should suffer the "sanction" of dismissal and destruction of his case, for which no logical or fair reason was given by the District Court or by the majority opinion:

> "Nor is there any reason suggested why '*demoralization of the court's authority*' would have resulted from giving the petitioner *a reasonable opportunity* to appear and offer a defense in open court to a charge of perjury or to the charge of *contempt*. * * *
>
> It is 'the law of the land' that no man's life, liberty *or property* be forfeited as a *punishment* until there has been a *charge fairly made and fairly tried* in a public tribunal. See *Chambers* v. *Florida*, 309 U.S. 227, 236, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716. The petitioner was convicted without that kind of trial." (Our emphasis).
>
> *In re*: *Oliver* (1948) 333 U.S. 257, 277-278, 68 S. Ct. 499, 509-510, 92 L. Ed. 682

Pre-Trial Rule 16 Gives No Power of Dismissal Not Otherwise Contained in the Rules of Civil Procedure.

The Courts have held that pre-trial *Rule 16* "confers *no special power of dismissal* not otherwise contained in the rules":

> "In dismissing the action the district court *relied* upon *Rules 16 and 11(b)*, 28 U.S.C.A. Rule 16 appears to have been invoked on the theory that *dismissal at the pre-trial stage is proper where it* clearly appears that plaintiff *will be unable to* prove the allegations of its complaint. We hold, however, that *Rule 16 confers no special power of dismissal not otherwise contained in the rules.* * * *" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, (2 Cir. 1958) 271 F. 2d 910, 914.

Even as to recalcitrant parties who were evading *orders* for discovery and the like (which did not occur in the

present case), dismissal with prejudice was applied with great caution:

> "• • • Dismissal with prejudice is a *drastic sanction* to be applied only in *extreme* situations. *Gill* v. *Stolow*, 2 Cir., 1957, 240 F. 2d 669; *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 2 Cir., 1949, 176 F. 2d 93, and here the preclusion order seems an ample penalty for any lack of cooperation on plaintiff's part.
>
> We hold that *dismissal was improper.*" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, (2 Cir. 1958) 271 F. 2d 910, 914.

> "• • • These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to *dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. • • •" (Our emphasis).
>
> *Societe International etc.* v. *Rogers* (1958), 78 S. Ct. 1087, 1094, quoted at pp. 31-34 *supra*.

"Due Process" Rights of Petitioner Were Violated.

Viewing this peculiar, unnatural, abortive hearing and its unnecessary and unjust results, it seems to fall far short of the basic requirements of "due process of law" under the *Fifth Amendment*. This is why we said at page 3 *supra*, that we think it is optional with this Court to grant relief under the Fifth Amendment, along with a correction of the erroneous procedural concepts below:

> "In judicial proceedings, due process of law means law in *its regular course* of administration through courts of justice, in accordance with the fundamental principles of free government. • • •" (Our emphasis).
>
> 16 C.J.S., Constituted Law, Sec. 567, p. 541.

> "The constitutional guaranty of due process of law is intended to protect the individual *against arbitrary*

exercise of governmental power and secure to all equal protection of the law. It is a matter of substance, not of form, and does not guarantee against judicial error." (Our emphasis)

16A C.J.S., Constitutional Law, sec. 569, p. 559.

"Exercise of power. The due process clauses require that a power conferred by law be exercised *judiciously* with an honest intent to fulfill the purpose of the law, *and it is a part of the judicial function to see that the requirement is met.*" (Our emphasis).

16A C.J.S., Constitutional Law, sec. 569(3), p. 570.

Due to like effect, the Supreme Court decisions above quoted at pages 34, 42.

None of the cases cited in the majority opinion are comparable with what occurred in this case, and none of them sustain the abortive procedure or the unjust result in this case.

Darlington v. *Studebaker-Packard Corp.*, (7 Cir. 1959) 261 F. 2d 903, cited in the opinion at the bottom of p. 545, was where a case was dismissed under this same District Court's *Local Rule 11* (now renumbered as Rule 10) *after 30 days notice*. This Rule is quoted at p. 7 *supra*. *It is the same Local Rule 11 which the majority opinion says two paragraphs earlier is not involved in our case.* The short excerpt quoted from it is dictum. The point decided was that this Local Rule 11 was not inconsistent with the Rules of Civil Procedure, and hence was a valid local rule.

Wisdom v. *Texas Co.*, (D.C., N.D., Ala. 1939) 27 F. Supp. 992, 993, cited in the opinion at p. 546, involved a pretrial hearing, but the *defendant moved under Rule 41(b)* for dismissal for want of prosecution, which, as above shown, *the defendant did not do in this case*. Further the

majority opinion says on the preceding page, point 3, that this *Rule 41(b) is not involved in our case.*

Dalrymple v. Pittsburgh Consolidated Coal Co., (D.C. W.D. Pa. 1959) 24 F.R.D. 260, cited in the opinion at p. 546, is shown by the quoted excerpt to have involved "flagrant disobedience" of the court's rules, whereas there admittedly was *no rule disobeyed in our case.*

Likewise, it appears from the majority opinion's own descriptions and excerpts from its remaining cases cited at page 546, that none are in point with our facts and all seem to have involved *disobedience of orders* for which various sanctions were imposed.

The dissenting opinion of Judge Schnackenberg, (291 F. 2d 547, R. 24) is an able and sufficient discussion of the facts and law, sufficient in itself to demonstrate grossly wrong procedure and needless injustice inflicted upon the plaintiff. His opinion is fully supported by the cases above quoted at pages 37-40 and elsewhere in this Brief. We have not discussed it in detail in this Petition, because it speaks for itself. We have endeavored to present additional points of law and fact.

Conclusion.

Therefore, Petitioner respectfully submits that this Court should reverse the judgments of dismissal and affirmance below and direct that same be vacated, and he asks all further just and proper relief in the premises.

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